United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17900

~~No. 17,476~~

FREDERICK C. ZANGARDI,

Appellant,

v.

WALTER N. TOBRINER, PRESIDENT
and
FREDERICK J. CLARKE, MEMBER,
and
JOHN B. DUNCAN, MEMBER,
BOARD OF D. C. COMMISSIONERS,

Appellees.

Appeal from a Judgment of the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the United States District Court for the District of Columbia was in error in failing to adjudge that Title 4, Section 527 of the District of Columbia Code (1961 Edition) includes aggravation of an injury or disease which did not originally arise in the performance of duty as a police officer, and in ordering that Summary Judgment be granted on defendant's Cross-Motion and dismissing Count Two of plaintiff's Complaint which is an action for declaratory judgment pursuant to Title 28 United States Code, Section 2201.

2. Whether, if the Court below was in error, plaintiff is entitled to retirement under Title 4, Section 527 rather than Section 526, since it is admitted that the condition for which plaintiff was ordered retired was in fact aggravated by duty as a police officer.

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Appeal from a Judgment of the United States
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia granting appellees' cross-motion for summary judgment and denying appellant's motion for

summary judgment entered on ~~October 23, 1962~~ APRIL 2, 1963 (J.A. ~~26~~, 27); this appeal filed ~~November 13, 1962~~ APRIL 29, 1963 (J.A. 27).

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1291, 1294 and 2106 to review the judgment of the Court below.

The complaint filed in the Court below was in Two Counts, Count One for Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred or Aggravated by Police Duty and Directing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty, and Count Two, for Declaratory Judgment (J.A. 1-5). Count One is still pending in the Court below. Count Two alleges that the Commissioners of the District of Columbia and their agents are misinterpreting Sections 526 and 527 of Title 4 of the District of Columbia Code (1961 Edition) and that the erroneous interpretation of the statute deprived appellant of substantial sums of money in that he was retired under Title 4, Section 526 and should have been retired pursuant to Title 4, Section 527. Jurisdiction in the Court below is based on Title 11, Section 306 of the D.C. Code, 1961 Edition and 28 U.S.C. Section 2201.

STATEMENT OF THE CASE

This is an appeal from the order of United States District Court Judge Charles F. McLaughlin granting summary judgment in favor of appellees Walter N. Tobriner, Frederick J. Clarke and John B. Duncan, The Board of Commissioners of the District of Columbia, dismissing Count Two of the Complaint and denying appellant Frederick C. Zangardi's motion for summary judgment (J.A. ~~26~~, 27).

Appellant Frederick C. Zangardi was appointed a member of the Metropolitan Police Department on November 28, 1949, serving continuously until June 6, 1961, when he was ordered by the Board of Police and Fire Surgeons to appear before the Police and Firemen's Retirement and Relief Board of the District of Columbia for consideration of retirement (J.A. 1). After hearing by the Retirement Board on August 3, 1961 and

October 3, 1961, appellant was ordered retired effective October 31, 1961, pursuant to Title 4, Section 526 of the D.C. Code, 1961 Edition, for injury or disease received or contracted other than in the performance of duty as a policeman (J.A. 1). Appeal was timely noted to appellees, the Personnel Officer, D.C., submitting to appellees a statement of the facts developed by the Retirement Board, wherein it was set out "That the Board was unable to find any evidence that would support a conclusion that appellant's condition arose from police duty but that there was ample reason to find that police duty aggravated appellant's condition (J.A. 2, 4). On January 29, 1962, appellees sustained the order of the Police and Firemen's Retirement and Relief Board, which had ordered appellant retired under Title 4, Section 526 of the D.C. Code, 1961 Edition (J.A. 3).

On March 24, 1962, appellant brought this suit in the United States District Court for the District of Columbia praying in Count One that the Court direct appellees to reverse their order retiring appellant under Title 4, Section 526, and directing appellees to order appellant retired under Title 4, Section 527, retroactive to October 31, 1961, and Count Two for Declaratory Judgment, praying that the Court adjudge that Title 4, Section 527 of the D.C. Code, 1961 Edition, includes aggravation of an injury or disease which did not originally arise in the performance of duty as a policeman, and that, since it is admitted that the condition for which appellant was ordered retired was aggravated by police duty, that the Court adjudge that appellant is entitled to be retired pursuant to Title 4, Section 527, rather than Title 4, Section 526 of the D.C. Code, 1961 Edition (J.A. 5).

Appellees filed their answer to the complaint on April 16, 1962, admitting the allegation of paragraphs four and eleven of the complaint wherein it was alleged "That there was ample evidence that police duty aggravated the condition for which plaintiff was retired" (J.A. 4, 7, 20). The answer, in paragraph 12, admits that the Police and Firemen's Retirement and Relief Board is bound by the interpretation of Title 4, Section 527 as set out in paragraph 11 of the complaint as the interpretation

of the Corporation Counsel as follows (J.A. 4, 7):

> "Whenever the Commissioners or their designated agents make a finding based upon substantial evidence that the member was injured or contracted a disease in the performance of duty, that such injury or disease was not sufficient to permanently disable him for the performance of duty, that after being restored to health he was returned to duty and thereafter in the further performance of duty the injury or disease originally contracted in the performance of duty was aggravated by such further performance of duty so as at that time to permanently disable him for the further performance of duty, then the Commissioners or their designated agents may, on the basis of the above findings, retire such member pursuant to authority contained in 4-527".

On July 2, 1962, appellant filed a motion for summary judgment on Count Two of the Complaint, with a statement of undisputed facts with a memorandum attached thereto as "Exhibit A" and points and authorities in support of the motion for summary judgment (J.A. 8, 12-15). On August 1, 1962, appellees filed a cross-motion for summary judgment on Count Two of the Complaint, a memorandum in support of the cross-motion and in opposition to appellant's motion for summary judgment (J.A. 16-24) and on August 2, 1962, their statement as to material facts as to which they contend there is no genuine issue (J.A. 25). Appellant's motion and appellees' cross-motion for summary judgment were heard by the Court, and on ~~October 23, 1962~~ APRIL 2, 1963, an order was entered granting appellees' cross-motion for summary judgment on Count Two and dismissing Count Two of the Complaint (J.A. ~~26~~ 27). Notice of appeal was filed ~~November 13, 1962~~ APRIL 29, 1963 (J.A. 27). COUNT TWO OF THE COMPLAINT WAS DISMISSED WITH AN EXPRESS DETERMINATION FOR ENTRY OF JUDGMENT UNDER RULE 54(b).

STATUTES INVOLVED

Title 4, Section 507, D.C. Code, 1951 Edition provided Retirement allowance for total disability.

> Whenever any member of the police department or the fire department of the District of Columbia shall become so permanently disabled through injury received or disease

contracted in the line of duty as to incapacitate him for the performance of duty, or, having served not less than twenty-five years and having reached the age of fifty-five years shall, for any cause, become so permanently disabled as to incapacitate him for the performance of duty and shall make written application therefor and said application shall be approved by the commissioners of said District, or, having reached the age of sixty years, in the discretion of the said commissioners, he shall in either event be retired from the service thereof and be entitled to receive relief from the said policemen and firemen's relief fund, District of Columbia, in an amount not to exceed 50 per centum per year of the salary received by him at the date of retirement. * * * (Sept. 1, 1916, 39 Stat. 718 ch. 433, Section 12; Feb. 17, 1923, 42 Stat. 1263, ch. 95, Section 1; Aug. 4, 1949, 63 Stat. 565, ch. 394, Section 1.)

Title 4, Section 521, D.C. Code, 1961 Edition, footnote entitled Legislative Intent:

Section 2 of act Aug. 21, 1957, provided as follows:

"It is the intent of Congress in enacting the Policemen and Firemen's Retirement and Disability Act Amendments of 1957 (enacting sections 4-521 to 4-538 and repealing sections 4-504, 4-511, 4-515, 4-516, and 4-520) to give the members coming under such Act benefits substantially similar to benefits given by the Civil Service Retirement Act Amendments of 1956 (U.S. Code, Title 5, Section 2251 note) to officers and employees covered by the Civil Service Retirement Act of May 29, 1930, as amended (U.S. Code, Title 5, Section 2251 et seq.)

Title 4, Section 526, D.C. Code, 1961 Edition, provides:

Retirement for disability not incurred in performance of duty.

Whenever any member coming under sections 4-521 to 4-535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at time of retirement: Provided further, That the annuity of a member retiring under this section shall be at least 40 per

centum of his basic salary at the time of retirement. (Sept. 1, 1916, ch. 433, Section 12 (f), as added Aug. 21, 1957, 71 Stat. 394, Pub. L. 85-157, Section 3.)

Title 4, Section 527, D.C. Code, 1961 Edition, provides:

Retirement for disability incurred while performing duty.

(g) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement. (Sept. 1, 1916, ch. 433, Section 12(g), as added Aug. 21, 1957, 71 Stat. 394, Pub. L. 85-157, Section 3.)

Title 4, Section 529, D.C. Code, 1961 Edition, provides:

Involuntary separation from service.

If any member is injured or contracts a disease during his first five years of service in his department which, in the judgment of the Board of Police and Fire Surgeons, disables him from performing further duty in his department, and if the Police and Firemen's Retirement and Relief Board finds that such injury or disease was not incurred in the performance of duty in his department, such member shall, upon the approval of such finding by the head of his department, and without regard for the provisions of any other law or regulation, be separated from the service. (Sept. 1, 1916, ch. 433, Section 12(i), as added Aug. 21, 1957, 71 Stat. 395, Pub. L. 85-157, Section 3.)

Title 4, Section 538, D.C. Code, 1961 Edition, provides:

Eligibility under the Federal Employees' Compensation Act.

Notwithstanding any other provision of law, no person entitled to receive any benefit under sections 4-521 to 4-535 on account of death incurred, an injury received, or disease contracted, or an injury or disease aggravated, in the performance of duty shall be entitled because of the same death, injury, disease, or aggravation, to benefits

under the Federal Employees' Compensation Act, as amended (5 U.S.C. 751, and the following). (Aug. 21, 1957, 71 Stat. 400, Pub.L. 85-157, Section 7.)

STATEMENT OF POINTS

It was error for the District Court to grant summary judgment on appellees' cross-motion and to deny appellant's motion for summary judgment.

1. That the Corporation Counsel for the District of Columbia has made an erroneous interpretation of Title 4, Section 527, of the District of Columbia Code (1961 Edition), ~~and~~ WHICH INTERPRETATION gives no effect or meaning to the word "aggravation", which word is present in the statute and must have been included by Congress for some purpose.

2. That the Police and Firemen's Retirement and Relief Board, which Board says it is bound by the interpretation of the statute as given to it by the Corporation Counsel, ordered appellant retired pursuant to Title 4, Section 526 of the District of Columbia Code (1961 Edition) and if appellant's contention that the interpretation of the statute made by the Corporation Counsel was not the intention of Congress, is correct, then the Board was bound by an erroneous interpretation and ~~should have ordered appellant retired pursuant to~~ APPELLANT IS ENTITLED TO RETIREMENT UNDER Title 4, Section 527 of the Code.

3. That the Court below erred in denying appellant's motion for summary judgment on Count Two of the Complaint which was an action for declaratory judgment to adjudge that Title 4, Section 527 of the District of Columbia Code (1961 Edition) includes aggravation of an injury or disease which did not originally arise in the performance of duty, and further erred in granting appellees' cross-motion for summary judgment and dismissing Count Two of the Complaint.

4. That the Court below should have found as a matter of law, that since appellees admit that the condition for which appellant was ordered retired was aggravated by police duty, that appellant was entitled to be

retired pursuant to Title 4, Section 527, of the District of Columbia Code (1961 Edition).

SUMMARY OF ARGUMENT

A decision based upon an erroneous interpretation of the law must be set aside. The finding of the Police and Firemen's Retirement and Relief Board that the condition for which appellant was ordered retired was as a matter of fact "aggravated by police duty" required that Board to order appellant retired under Title 4, Section 527 of the D.C. Code, 1961 Edition.

The Board, however, having been instructed by appellees' agent, the Corporation Counsel for the District of Columbia, that the only aggravation to which they could give cognizance, was aggravation of injury or disease originally contracted in the performance of duty, and finding that appellant's condition was not originally contracted in the performance of duty, ordered appellant retired under Title 4, Section 526.

The construction of Title 4, Section 527, given by appellees' agent completely ignores and gives no meaning to the word "aggravation" because reading said statute, and giving it its plain meaning, it is clear that if an injury or disease is incurred or contracted in the line of duty, the member is entitled to retirement under this section no matter when it becomes disabling or whether or not there has been subsequent aggravation.

The Court below should have found as a matter of law that the Board was laboring under an improper interpretation of the statute and should have granted appellant summary judgment on Count Two of the Complaint.

ARGUMENT

I

The Retirement Board Having Found That Appellant Was Disabled for Performance of Duty and That the Condition For Which Appellant Was Ordered Retired Was Aggravated By Police Duty, Should Have Ordered Appellant Retired Pursuant to Title 4, Section 527 of The District of Columbia Code (1961 Edition) Rather Than Title 4, Section 526.

Appellees' agent, the Police and Firemen's Retirement and Relief Board, made a finding after hearing, that the condition for which appellant was ordered retired effective October 31, 1961, was "aggravated by police duty", but, being unable to find any evidence that would support a conclusion that said condition "arose" from police duty, ordered appellant retired pursuant to Title 4, Section 526 of the D.C. Code, 1961 Edition, for injury or disease contracted other than in the performance of duty, at an annuity of 40% of his basic salary at the time of retirement. Appellant should have been ordered retired pursuant to Title 4, Section 527 of the D.C. Code, 1961 Edition, for disease aggravated by police duty, at an annuity of 66 2/3% of his basic salary at the time of retirement, but appellees' agent, laboring under an interpretation of Title 4, Section 527, which requires that the policeman or fireman receive an original injury or disease in the actual performance of duty, be restored to health and returned to duty and then, in the further performance of duty if that injury or disease is aggravated by further performance of duty, then, he may be retired pursuant to Title 4, Section 527 (J.A. 4, 7).

First, appellant would like to bring to the attention of the Court the case of Crawford v. McLaughlin, et al., 109 U.S. App. D.C. 264, 286 F.2d 821, where the appellant received an injury while making an arrest in 1950, ordered retired in 1959, and although he had back pains in 1953 and again in 1956 and 1957, there was nothing that he had done to aggravate the condition or make it worse. According to the interpretation of the statute by which appellees' agent is bound (J.A. 7), since Crawford was restored to duty and there was no evidence of aggravation either on or off duty, he was

not eligible to retire pursuant to Title 4-527. However, it is apparent that he was retired in 1959 for an injury received in 1950 without the requirement of additional aggravation while in the performance of duty. A plain reading of Title 4-527 makes it obvious that any time a policeman or fireman is injured or contracts a disease in the performance of duty and that injury or disease permanently disables him for the performance of duty he is to be retired at 66 2/3% no matter whether it is the day after receiving the injury or contracting the disease or ten years thereafter and whether or not there has been aggravation. If Congress had intended the interpretation by which the Police and Firemen's Retirement and Relief Board is bound, then, instead of using the word "or" in the statute, they would have used the word "and".

A comparison of Title 4, Sections 526, 527 and 529 reveals that only in Section 527 is the word aggravation used. If Congress had intended the interpretation relied upon by appellees' agent, the word aggravation could have been omitted completely and would not have changed the results reached by the Retirement Board. It seems clear that Sections 526 and 529 were meant to apply to those situations where a member's injury or disease had no connection whatever with duty as a policeman or fireman and to provide for an annuity for those with five years service and no annuity for those with less than five years service. Would appellees' agent have been permitted by law to retire appellant pursuant to Section 529 if he had not had five years service, but admitting that the condition for which he was ordered retired was "aggravated by duty"?

Appellant's position is further fortified by Title 4, Section 538, which prohibits a member who receives benefits under Sections 4-521 to 4-535 from making claim under the Federal Employees' Compensation Act. If appellees' agent's interpretation is correct, there is a serious conflict since the footnote to Title 4, Section 521, entitled Legislative Intent states:

> "It is the intent of Congress in enacting the Policemen and Firemen's Retirement and Disability Act Amendments of 1957 (enacting sections 4-521 to 4-538 and repealing sections 4-504, 4-511, 4-515, 4-516 and 4-520) to give the

> members coming under such Act benefits substantially similar to benefits given by the Civil Service Retirement Act Amendments of 1956 (U.S. Code, title 5, Section 2251 note) to officers and employees covered by the Civil Service Retirement Act of May 29, 1930, as amended (U.S. Code, title 5, Section 2251, et seq.)"

If a policeman or fireman with less than five years of service is retired pursuant to Title 4-529, for an injury or disease not received or contracted in the line of duty, but a condition that was admittedly aggravated by duty, since he would receive no benefits under Sections 4-521 to 4-535, would he be eligible to make claim because of a disease aggravated in the performance of duty under the Federal Employees' Compensation Act, or was it the intention of Congress to have all service connected injuries or diseases, whether service connected by reason of an incident occurring while in the performance of duty or by reason of aggravation arising from the employment, compensated under the Policemen and Firemen's Retirement and Disability Act Amendments of 1957? In view of the Legislative Intent it certainly could not have been the intention of Congress to completely outlaw such a claim admittedly service connected by aggravation of a pre-existing but unrecognized condition.

In the Court below appellees argued that prior to the enactment of the 1957 Amendments members were not entitled to benefits based on disability except where the disability was incurred in the performance of duty (J.A. 18). This makes reference to Title 4-507 of the D.C. Code, 1951 Edition, which states in part:

> "Whenever any member of the police department or the fire department of the District of Columbia shall become so permanently disabled through injury or disease contracted (emphasis added) in the line of duty as to incapacitate him for the performance of duty * * * he shall * * * be entitled to receive relief * * * in an amount not to exceed 50 per centum per year * * * ".

Where, as here, appellant's disability is admittedly aggravated by duty as a policeman, was it not contracted in the line of duty? Appellees state that the prior statute, Title 4-507, produced inequities and hardship

(J.A. 18), but since appellant is receiving 40 per centum per annum under the law as appellees interpret it, and would have received 50% under the prior law, it is difficult to see how any deficiency was overcome as claimed (J.A. 18). From the Legislative Intent it appears that Congress intended some improvement by adding 16 and 2/3% to a retiree's annuity rather than deducting 10%. Appellees apparently tried to give the impression in the Court below that appellant would have been entitled to no retirement under the prior law (J.A. 18), stating that under the prior Act no retirement was possible for a policeman or fireman permanently injured outside (emphasis added) the line of duty unless he had twenty-five years of service. Since appellant's disability was in fact aggravated by police duty (J.A. 4, 7, 20) could it have been held under the prior law that it was not contracted in the line of duty?

It is submitted that appellees' agent, the Retirement and Relief Board, laboring under an erroneous interpretation of the law, was in error in ordering appellant retired under Title 4-526 rather than Title 4-527, and appellant calls upon this Court to correct the error.

II

The Court Below Should Have Found That the Interpretation Of Title 4, Section 527, Made by the Corporation Counsel, And Relied upon by Appellees and the Retirement Board, Was Erroneous, and Should Have Granted Appellant's Motion For Summary Judgment.

Appellant called upon the Court below to adjudge that Title 4-527 of the D.C. Code (1961 Edition) includes aggravation of an injury or disease which did not originally arise in the performance of duty and that since it is admitted that the plaintiff's condition for which he was ordered retired was aggravated by police duty, that plaintiff is entitled to be retired pursuant to Title 4-527, rather than Title 4-526 (J.A. 5). The Court, on motion and cross-motion for summary judgment on this issue, ruled that after consideration of the motions, exhibits and memoranda of points and authorities, after oral argument, that defendant's motion for summary

judgment be granted and that Count II be dismissed. The Court below, by its adjudication, compounded the error which appellant claims is being made by appellees' agent. The Court below construed the statute so as to require an injury or disease to be received or contracted in the line of duty and gave no significance to the portion of the statute where twice the word aggravation is used. "There is a presumption against a construction which will render a statute ineffective or inefficient or would cause grave public injury or even inconvenience", National Homeopathic Association v. Britton, 79 U.S. App. D.C. 309, 147 F.2d 561, cert. den., 65 S.Ct. 1185, 325 U.S. 857, 89 L.Ed. 1977. The Court should have applied the maxim "Ut res magis valeat quam pereat," and given the word aggravation a meaning, rather than, as does the Corporation Counsel's opinion (J.A. 12, 21, 22) give no effect at all to the word aggravation.

"Before a Court accepts a course of depriving disputed words in a statute of any real significance, it is entitled to seek out the purpose of the legislation through such extrinsic aids as may be available", Myers v. Hollister, 96 U.S. App. D.C. 388, 226 F.2d 346, cert. den., 76 S.Ct. 474, 350 U.S. 987, 100 L.Ed. 854, rehearing denied, 76 S.Ct. 786, 351 U.S. 934, 100 L.Ed. 1462.

Appellant says, that had the Court below given the word aggravation a meaning, and as stated in Crawford v. McLaughlin, et al, supra, citing Bradley v. City of Los Angeles, 55 Cal. App. 2d 592, 131 P.2d 391 (1942), had the Court below given consideration to the humane purpose of retirement laws, it should have been adjudged that appellant is entitled to retirement pursuant to Title 4-527.

In a somewhat similar situation, the lower Court in the case of Garratt v. City of Philadelphia, 387 Pa. 442, 127 A.2d 738 (1956), sustained objections in the nature of a demurrer and dismissed a complaint in mandamus to compel the Award Committee to award $10,000.00 to the widow of a fireman killed while fighting a fire, agreeing with the Award Committee that a City Ordinance providing for the award required (1) the death which occurred must have occurred while fighting a fire, and

(2) must have resulted from an heroic deed which involved a special hazard or risk. The pertinent section of the Ordinance states:

> "Section 1. The Council hereby provides that the sum of ten thousand (10,000) dollars shall be paid to the surviving widow or dependent children or dependent parents of every fireman, policeman, or park policeman who is killed in the course of responding to an alarm, fighting a fire, apprehending a criminal, or in the course of performing an heroic deed which involves a special hazard or risk".

The Supreme Court of Pennsylvania, in reversing, stated:

> "The core of the City's interpretation which was adopted by the Court below, is that the death must have resulted in every case in the performance of an heroic deed. This is contrary to the clear and specific language of the Ordinance. Section 1 * * * clearly and explicitly provides that $10,000.00 shall be paid to a surviving widow of a fireman who is killed in the course of fighting a fire, or in the course of performing an heroic deed which involves a special hazard or risk. 'Or' in its ordinary usage and meaning clearly and undoubtedly means 'or'. 'Or' can only be construed to mean 'and' when to give the word 'or' its ordinary meaning would be to produce a result that is absurd or impossible of execution or highly unreasonable or would manifestly change or nullify the intention of the legislative body."

Appellant says that the Court below, in affirming the interpretation of 4-527 as set out by the Corporation Counsel, has done the same thing as the lower Court in Garratt v. City of Philadelphia, supra, and has permitted the substitution of the word "and" where the statute states "or".

CONCLUSION

Since it is obvious that Congress intended to give benefits greater than those under the previous retirement act and not reduce a policeman's or fireman's annuity, that there is no question that appellant's disability is service connected, it being admitted that the condition for which he was ordered retired was aggravated by police duty, it is clear that the Retirement Board was acting under an erroneous interpretation of the law and that the granting of appellees' motion for summary judgment and the denial

of appellant's motion for summary judgment on Count Two in the Court below was error.

It is respectfully submitted, therefore, that the judgment of the Court below be reversed with instructions to enter summary judgment for appellant for the relief prayed in Count Two of the complaint filed herein.

Respectfully submitted,

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INDEX TO JOINT APPENDIX

JOINT APPENDIX

[Filed March 24, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Frederick C. Zangardi 4705 Wissahican Avenue Rockville, Maryland Plaintiff	)	
v.	)	
Walter N. Tobriner, President Frederick J. Clarke, Member John B. Duncan, Member Board of Commissioners of The District of Columbia District Building Washington, D.C. Defendants	)	Civil Action No. 968-62

COMPLAINT FOR MANDATORY INJUNCTION DIRECTING RETIREMENT OF POLICE OFFICER FOR DISABILITY INCURRED OR AGGRAVATED BY POLICE DUTY AND DIRECTING REVERSAL OF THE ORDER RETIRING POLICE OFFICER FOR DISABILITY NOT INCURRED IN PERFORMANCE OF DUTY, AND FOR DECLARATORY JUDGMENT

1. This Court has jurisdiction under Title 11, 306 of the District of Columbia Code and Title 28, Section 2201 of the United States Code.

COUNT ONE
(MANDATORY INJUNCTION)

2. Plaintiff was appointed a member of the Metropolitan Police Department on November 28, 1949, and served continuously until June 6, 1961, when he was ordered by the Board of Police and Fire Surgeons to appear before the Police and Firemen's Retirement and Relief Board of the District of Columbia for consideration of retirement.

3. On, to wit, August 3, 1961 and October 3, 1961, plaintiff appeared before the Police and Firemen's Retirement and Relief Board as ordered, testimony was taken, and on, to wit, October 16, 1961, said Board ordered plaintiff retired effective October 31, 1961, for injury or disease received or contracted other than in the performance of duty as a policeman.

Plaintiff was ordered retired for a condition diagnosed as "psychophysiological reaction, multiple" and plaintiff says that the evidence did not permit a finding that would allow retirement for injury or disease received or contracted other than in the performance of duty and that therefore the Order issued by the Police and Firemen's Retirement and Relief Board was arbitrary, capricious, not in conformity with the evidence, in violation of law and in derogation of plaintiff's rights. Plaintiff alleges that said Board acting as agents of the defendants herein, knew or should have known that said Order was not in conformity with the evidence and therefore unlawful.

4. On, to wit, October 20, 1961, plaintiff, through counsel, noted an appeal to the defendants, pursuant to defendants' Order Number 60-2394. On, to wit, December 20, 1961, pursuant to the foregoing Order, Mr. Henry F. Hubbard, Personnel Officer, D.C., defendants' agent, submitted to the defendants a statement of the facts developed by the Police and Firemen's Retirement and Relief Board concerning the retirement of plaintiff at the hearings in which statement of facts it was set out that the Board was unable to find any evidence that would support a conclusion that plaintiff's condition arose from police duty, but added that there was ample reason to find that police duty aggravated plaintiff's condition. Plaintiff alleges that there was evidence that would support a conclusion that his condition arose from police duty, but, if as admitted by defendants' agent "police duty aggravated plaintiff's condition, then plaintiff should have been ordered retired pursuant to Title 4, Section 527 of the District of Columbia Code (1961 Edition) for disability incurred while performing duty.

5. Hearing of the appeal before the defendants was held on January 25, 1962, and plaintiff, through counsel, pointed out to the defendants that the Police and Firemen's Retirement and Relief Board were making their decisions on the questions of retirement using an improper standard and that if as admitted by defendants' agent in this case "there was ample reason to find that police duty aggravated plaintiff's condition", then the Order retiring plaintiff under Title 4,

Section 526 was improper and should be reversed. On January 29, 1962, defendants sustained the Order of the Police and Firemen's Retirement and Relief Board, and plaintiff alleges that the decision of defendants sustaining the aforesaid Order was arbitrary, capricious, unsupported by facts, based upon an improper interpretation of the law and in derogation of plaintiff's rights and that defendants knew or should have known that their decision was unlawful.

6. Plaintiff has exhausted his administrative remedy and has no other remedy available other that that requested herein.

WHEREFORE, plaintiff prays:

1. That the Court issue a Mandatory Injunction directing the defendants to reverse the Order of the Police and Firemen's Retirement and Relief Board dated October 16, 1961, ordering plaintiff retired for disability not incurred in the line of duty and directing defendants to order plaintiff retired for disability incurred while performing duty effective October 31, 1961, and further directing the defendants to pay to plaintiff in a lump sum the difference between the 40% retirement and 66 2/3% from November 1, 1961 to and including the date plaintiff's retirement is increased to 66 2/3% as required by Title 4, Section 527 of the D.C. Code.

2. That the Court grant such other and further relief as the nature of the case may require.

3. That defendants be required to pay all costs of this action.

COUNT TWO
(DECLARATORY JUDGMENT)

7. Paragraph 1 is incorporated and adopted herein.

8. This is an action for declaratory judgment pursuant to 28 USC Section 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

9. Paragraphs 2, 3, 4, 5 and 6 are adopted and incorporated herein.

Plaintiff was ordered retired for a condition diagnosed as "psychophysiological reaction, multiple" and plaintiff says that the evidence did not permit a finding that would allow retirement for injury or disease received or contracted other than in the performance of duty and that therefore the Order issued by the Police and Firemen's Retirement and Relief Board was arbitrary, capricious, not in conformity with the evidence, in violation of law and in derogation of plaintiff's rights. Plaintiff alleges that said Board acting as agents of the defendants herein, knew or should have known that said Order was not in conformity with the evidence and therefore unlawful.

4. On, to wit, October 20, 1961, plaintiff, through counsel, noted an appeal to the defendants, pursuant to defendants' Order Number 60-2394. On, to wit, December 20, 1961, pursuant to the foregoing Order, Mr. Henry F. Hubbard, Personnel Officer, D.C., defendants' agent, submitted to the defendants a statement of the facts developed by the Police and Firemen's Retirement and Relief Board concerning the retirement of plaintiff at the hearings in which statement of facts it was set out that the Board was unable to find any evidence that would support a conclusion that plaintiff's condition arose from police duty, but added that there was ample reason to find that police duty aggravated plaintiff's condition. Plaintiff alleges that there was evidence that would support a conclusion that his condition arose from police duty, but, if as admitted by defendants' agent "police duty aggravated plaintiff's condition, then plaintiff should have been ordered retired pursuant to Title 4, Section 527 of the District of Columbia Code (1961 Edition) for disability incurred while performing duty.

5. Hearing of the appeal before the defendants was held on January 25, 1962, and plaintiff, through counsel, pointed out to the defendants that the Police and Firemen's Retirement and Relief Board were making their decisions on the questions of retirement using an improper standard and that if as admitted by defendants' agent in this case "there was ample reason to find that police duty aggravated plaintiff's condition", then the Order retiring plaintiff under Title 4,

Section 526 was improper and should be reversed. On January 29, 1962, defendants sustained the Order of the Police and Firemen's Retirement and Relief Board, and plaintiff alleges that the decision of defendants sustaining the aforesaid Order was arbitrary, capricious, unsupported by facts, based upon an improper interpretation of the law and in derogation of plaintiff's rights and that defendants knew or should have known that their decision was unlawful.

6. Plaintiff has exhausted his administrative remedy and has no other remedy available other that that requested herein.

WHEREFORE, plaintiff prays:

1. That the Court issue a Mandatory Injunction directing the defendants to reverse the Order of the Police and Firemen's Retirement and Relief Board dated October 16, 1961, ordering plaintiff retired for disability not incurred in the line of duty and directing defendants to order plaintiff retired for disability incurred while performing duty effective October 31, 1961, and further directing the defendants to pay to plaintiff in a lump sum the difference between the 40% retirement and 66 2/3% from November 1, 1961 to and including the date plaintiff's retirement is increased to 66 2/3% as required by Title 4, Section 527 of the D.C. Code.

2. That the Court grant such other and further relief as the nature of the case may require.

3. That defendants be required to pay all costs of this action.

COUNT TWO
(DECLARATORY JUDGMENT)

7. Paragraph 1 is incorporated and adopted herein.

8. This is an action for declaratory judgment pursuant to 28 USC Section 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

9. Paragraphs 2, 3, 4, 5 and 6 are adopted and incorporated herein.

10. Plaintiff says that the defendants and their agents are misinterpreting Sections 526 and 527 of Title 4 of the District of Columbia Code (1961 Edition) and that as the result of said misinterpretation he is being deprived of substantial sums of money, namely, the difference between 40% and 66 2/3% of his base salary as a police officer as of and since November 1, 1961.

11. As set out in paragraph 4 above, it was admitted by defendants' agent that there was ample evidence that policy duty aggravated plaintiff's condition. Plaintiff says that this requires retirement under Title 4-527, but defendants' agent has interpreted said section of the Code as follows:

> "Whenever the Commissioners or their designated agents make a finding based upon substantial evidence that the member was injured or contracted a disease in the performance of duty, that such injury or disease was not sufficient to permanently disable him for the performance of duty, that after being restored to health he was returned to duty and thereafter in the further performance of duty the injury or disease originally contracted in the performance of duty was aggravated by such further performance of duty so as at that time to permanently disable him for further performance of duty, then the Commissioners or their designated agents may, on the basis of the above findings, retire such member pursuant to authority contained in 4-527".

Title 4-527 actually states as follows:

> "Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disable him for the performance of duty, he shall upon retirement for such disability * * *".

The construction of the foregoing statute given by the defendants completely ignores and gives no meaning to the word "aggravation", because if the injury or disease must originate in the performance of duty then a member would be entitled to retire for the original injury

when it disabled him for performance of duty no matter when it disabled him and there would be no need for the use of the word aggravation in the statute.

12. The Police and Firemen's Retirement and Relief Board, which originated the Order retiring plaintiff, says they are bound by the interpretation given the foregoing statute, and that even though plaintiff's retirement was due to disability which was aggravated by policy duty, he must be retired under Title 4-526, since the condition did not originate in the performance of duty, and it is clear that the erroneous interpretation has caused grievous harm to plaintiff.

WHEREFORE, plaintiff demands that the Court adjudge:

That Title 4-527 of the District of Columbia Code (1961 Edition) includes aggravation of an injury or disease which did not originally arise in the performance of duty and that since it is admitted that plaintiff's condition for which he was ordered retired was aggravated by policy duty, that plaintiff is entitled to be retired pursuant to Title 4-527, rather than Title 4-526.

/s/ Frederick C. Zangardi

STATE OF MARYLAND)
MONTGOMERY COUNTY) SS:

Frederick C. Zangardi, being first duly sworn, deposes and says that he is the plaintiff in the above case, that he has read the Complaint and that the facts and statements therein alleged are true.

Subscribed and sworn to before me this 24th day of March, 1962.

/s/
Notary Public

(SEAL) My Commission Expires

/s/ Norman H. Heller
Attorney for Plaintiff

* * *

[Filed April 16, 1962]

ANSWER OF DEFENDANTS

First Defense

The complaint for mandatory injunction and declaratory judgment fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. The defendants admit the allegations contained in paragraph numbered 1 of the complaint.

COUNT ONE

2. The defendants admit the allegations contained in paragraph numbered 2 of Count One of the complaint.

3. The defendants admit the allegations contained in the first complete sentence of paragraph numbered 3 of Count One of the complaint and deny the allegations contained in the remaining two sentences of said paragraph.

4. In answer to paragraph numbered 4 of Count One of the complaint, the defendants admit the allegations contained in the first sentence thereof and deny the allegations contained in the last sentence of said paragraph.

5. The defendants deny that their decision sustaining the order of the Police and Firemen's Retirement and Relief Board is arbitrary, capricious and unsupported by the facts, deny that it is based upon an improper interpretation of the law, deny that it is in derogation of plaintiff's rights, and deny that it is unlawful. The defendants admit the remaining allegations contained in paragraph numbered 5 of Count One of the complaint.

6. The defendants admit that plaintiff has exhausted his administrative remedy.

COUNT TWO

7. In answer to paragraph numbered 7 of Count Two of the complaint, the defendants adopt and by reference incorporate herein their answer to paragraph numbered 1 of the complaint.

8. The defendants admit the allegations contained in paragraph numbered 8 of Count Two of the complaint.

9. In answer to paragraph numbered 9 of Count Two of the complaint, the defendants adopt and by reference incorporate herein their answer to paragraphs numbered 2, 3, 4, 5 and 6 of Count One of the complaint.

10. The defendants deny the allegations contained in paragraph numbered 10 of Count Two of the complaint.

11. The defendants admit the allegation contained in the first complete sentence of paragraph numbered 11 of Count Two of the complaint and deny all remaining conclusions, argument and, if any, allegations contained in said paragraph.

12. The defendants deny that the Police and Firemen's Retirement and Relief Board erroneously interpreted the law and deny that its interpretation of the law has caused plaintiff grievous harm. The defendants admit that the Police and Firemen's Retirement and Relief Board is bound by the interpretation of the statute set out in paragraph numbered 11 of Count Two of the complaint.

CHESTER H. GRAY
Corporation Counsel, D.C.

JOHN A. EARNEST
Assistant Corporation Counsel, D.C

GEORGE H. CLARK
Assistant Corporation Counsel, D.C.

Attorneys for Defendants

* * *

[Certificate of Service]

[Filed July 2, 1962]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court for an Order granting Summary Judgment in the above case and for reasons therefore states:

1. That there is no dispute as to material facts insofar as Count Two of the Complaint, which Count is a Complaint for Declaratory Judgment under Title 28, Section 2201 of the United States Code, for the purpose of determining a question of actual controversy between the parties.

2. That the issue before the Court is the interpretation of Title 4, Section 527 of the District of Columbia Code (1961 Edition), which provision is set out in the Statement of Undisputed Facts attached hereto.

3. That if, as plaintiff contends, defendants are misinterpreting said Code provision, then plaintiff has been and will in the future be grievously harmed unless the defendants are instructed by the Court to correct their erroneous interpretation.

4. That plaintiff is a person whose rights are affected by the foregoing Code provision and is requesting the Court for a determination of a question of construction of said Code provision and a declaration of his rights thereunder.

5. That a declaration of plaintiff's rights will settle and afford relief from uncertainty and insecurity with respect to the rights and status of all persons coming under said Code provision.

6. For such other and further reasons as will be brought to the attention of the Court at the hearing of this motion.

Norman H. Heller
Attorney for Plaintiff

[Certificate of Service]

PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

Until October 31, 1961, plaintiff was among that class of person defined in Title 4, Section 521(1) of the District of Columbia Code (1961 Edition) as a "member" and having completed more than five years of police service, upon being found disabled for the performance of duty, was entitled to be retired pursuant to either Title 4, Section 526 or Title 4, Section 527, which Code provisions are set out as follows:

Title 4, Section 526 Retirement for disability not incurred in performance of duty.

"Whenever any member coming under sections 4-521 to 4-535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement: Provided further, That the annuity of a member retiring under this section shall be at least 40 per centum of his basic salary at the time of retirement."

Title 4, Section 527 Retirement for disability incurred while performing duty.

"Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement

nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement".

In July, 1961, plaintiff was ordered to appear before the Police and Firemen's Retirement and Relief Board and hearings were held on August 3, 1961 and October 3, 1961, testimony was taken, and on October 16, 1961, plaintiff was ordered retired effective October 31, 1961, for injury or disease received or contracted other than in the performance of duty under Title 4, Section 526, at an annuity of 40 per centum of his basic salary. Plaintiff duly noted an appeal from the decision of the Police and Firemen's Retirement and Relief Board and pursuant to the provisions of Commissioners' Order No. 60-2394 dated November 22, 1960, Mr. Henry F. Hubbard, Personnel Officer of the District of Columbia, as defendants' agent, submitted to the Commissioners a statement relative to the facts developed by the Police and Firemen's Retirement and Relief Board concerning the case of plaintiff. Said statement, dated December 20, 1961, sets out on page 3 as follows:

"Dr. Leslie Sanders testified to the effect that while serving as psychiatrist on the Board of Police and Fire Surgeons he had diagnosed Private Zangardi's problem as an anxiety reaction. This, he attributed to Zangardi's repressed or suppressed feelings of anger at being relieved of a coveted assignment. With these feelings Private Zangardi was apprehensive about doing patrol duty for fear of how he would conduct himself.

In response to a specific question Dr. Sanders was not sure that police duty caused Private Zangardi's condition. He was certain, however, that police duty aggravated his condition."

The statement on page 4 states:

"The Board after considering all the testimony in this case was unable to find any evidence that would support a conclusion that Private Zangardi's condition arose from policy duty. There was ample reason to find that police duty aggravated his condition."

Paragraph 11 in Count Two of plaintiff's complaint filed herein, alleges that the defendants' agent has interpreted Title 4, Section 527 as follows:

> "Whenever the Commissioners or their designated agents make a finding based upon substantial evidence that the member was injured or contracted a disease in the performance of duty, that such injury or disease was not sufficient to permanently disable him for the performance of duty, that after being restored to health he was returned to duty and thereafter in the further performance of duty the injury or disease originally contracted in the performance of duty was aggravated by such further performance of duty so as at that time to permanently disable him for further performance of duty, then the Commissioners or their designated agents may, on the basis of the above findings, retire such member pursuant to authority contained in 4-527."

Defendants' answer to the complaint, paragraph 12 of Count Two, states "The defendants admit that the Police and Firemen's Retirement and Relief Board is bound by the interpretation of the statute set out in paragraph numbered 11 of Count Two of the Complaint."

Hearing in the matter of the appeal from the decision of the Police and Firemen's Retirement and Relief Board was held before the defendants on January 25, 1962, at which time, plaintiff, through counsel, in support of reversal, submitted a four page memorandum to the defendants, which memorandum was made part of the record on appeal and is attached hereto as "Exhibit A".

On January 29, 1962, defendants affirmed the Order appealed from.

Norman H. Heller
Attorney for Plaintiff

[Certificate of Service]

EXHIBIT A

MEMORANDUM -- TITLE 4-526, 4-527 D.C. CODE

ISSUE: Has the Board of D.C. Commissioners adopted an interpretation of the statutes which manifestly changes or nullifies the intention of Congress?

LEGISLATIVE INTENT

The footnote to 4-521 sets out "It is the intent of Congress in enacting the Policemen and Firemen's Retirement and Disability Act Amendments of 1957 (enacting sections 4-521 to 4-538 and repealing sections 4-504, 4-511, 4-515, 4-516 and 4-520) to give the members coming under such Act benefits substantially similar to benefits given by the Civil Service Retirement Act Amendments of 1956 (U.S. Code, title 5, Section 2251 note) to officers and employees covered by the Civil Service Retirement Act of May 29, 1930, as amended (U.S. Code, title 5, Section 2251, et seq.).

CORPORATION COUNSEL'S OPINION

The following is an excerpt from a previous hearing:

"Whenever the Commission or its designated agent makes a finding based upon substantial evidence that a member has been injured or has contracted a disease in the performance of duty which permanently disables him from the performance of duty, he may be retired pursuant to authority contained in Subsection G."

"Whenever the Commissioners or their designated agents make a finding based upon substantial evidence that the member was injured or contracted a disease in the performance of duty, that such injury or disease was not sufficient to permanently disable him for the performance of duty, that after being restored to health he was returned to duty and thereafter in the further performance of duty the injury or disease originally contracted in the performance of duty was aggravated by such further performance of duty so as at that time to permanently disable him for further performance of duty, then Commissioners or their designated agents may, on the basis of the above findings, retire such member pursuant to authority contained in Subsection G."

EXHIBIT A (Con't.)

SUBSECTION G (4-527)

Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability receive an annuity * * * nor shall it be less than 66 2/3 per centum.

"OR"

The word "or" can only be construed to mean "and" when to give the word "or" its ordinary meaning would be to produce a result that is absurd or impossible of execution or highly unreasonable or would manifestly change or nullify the intention of the legislative body. Garratt v. City of Philadelphia, 127 A. 2d 738 (Sup. Ct. of Pa. Dec. 29, 1956).

QUAERE

Is the interpretation as set forth in the Corporation Counsel's Opinion giving effect to that portion of the statute that reads "or such injury or disease is aggravated by such duty at any time after appointment"? It is obvious that if the intent of Congress was as is set out by the "Opinion" then there would be no purpose in this portion of the statute. The words are merely surplusage, because if an injury received in line of duty is sustained the member is entitled to be retired under 4-527 when and if that injury incapacitates him for further duty whether or not it has been aggravated. Since the words have been included in the statute, their plain meaning must be applied, and not disregarded or given a strained interpretation to fit the whim or desire of the person makind the interpretation. "When the words of the law are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Garratt v. City of Philadelphia, supra.

The position that the Corporation Counsel is not correct in his interpretation is further fortified by a reading of 4-538 entitled Eligibility under the Federal Employees' Compensation Act, as follows:

EXHIBIT A (Con't.)

Notwithstanding any other provision of law, no person entitled to receive any benefit under Sections 4-521 to 4-535 on account of death incurred, an injury received, or disease contracted, or an injury or disease aggravated (emphasis added), in the performance of duty shall be entitled, because of the same death, injury, disease, or aggravation, to benefits under the Federal Employees' Compensation Act.

The use of the word "or" clearly is meant to set out the various conditions under which members could not make claim under the F.E.C.A. If the injury or disease aggravated in the performance of duty had to be originally received or contracted in performance of duty these words are again surplusage. Why would Congress insist upon adding unnecessary words?

WHERE "AGGRAVATION" HAS BEEN OMMITTED.

To climax the argument 4-529 sets out the conditions upon which a member can be involuntarily separated from service.

If any member is injured or contracts a disease during his first five years of service in his department which, in the judgment of the Board of Police and Fire Surgeons, disables him from performing further duty in his department, and, if the Police and Firemen's Retirement and Relief Board finds that such injury or disease was not incurred in the performance of duty in his department such member shall* * * be separated from the service.

Primarily, note that when Congress means to set out two conditions that must operate it uses the word "and" not the word "or", but more important, can a member be involuntarily separated under this provision if during his first five years he is found to be disabled from performing duty by an injury or disease not incurred in the performance of duty but disabled by an injury or disease aggravated by police duty. If the wording of the code provision gave two conditions that must be met can a third be added by interpretation? Would not have Congress included aggravation within the first five years if it were meant to exclude such members from a pension?

EXHIBIT A (Con't.)

4-526

In order to retire a member under this section he must be found to have become disabled due to injury or disease contracted other than in the performance of duty. Can a member whose injury or disease is aggravated by such duty be found to be disabled due to injury or disease contracted other than in the performance of duty? What the Corporation Counsel is saying completely rewrites 4-526 to read * * * and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty or an injury or disease contracted other than in the performance of duty and later aggravated by policy duty. If Congress meant this they would have said just that.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

There is a presumption against a construction which will render a statute ineffective or inefficient or would cause grave public injury or even inconvenience. National Homeopathic Association of D.C. v. Britton, 79 U.S. App. D.C. 309, 147 F 2d. 561, cert. den. 65 S. Ct. 1185.

Before a Court accepts a course of depriving disputed words in a statute of any real significance, it is entitled to seek out the purpose of the legislation through such extrinsic aids as may be available. Myers v. Hollister, 96 U.S. App. D.C. 388, 226 F 2d. 346.

The retirement law for Policemen and Firemen prior to the effective date of the present statute was contained in Title 4, Section 507 of the D.C. Code (1951 Edition). This section allowed retirement for either disability for injury received or disease contracted in the line of duty or for 25 years of service at age 55. There was no mention of injury or disease aggravated as is contained in Title 4, Section 527 of the 1961 Code. If Congress had intended no change except the amount of per centum of annuity there would have been no necessity or reason to insert

the word aggravation in the statute. It must be assumed that by adding the words "or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him" that Congress intended the words be given a meaning.

Rather than repeat the argument referring to the construction of and meaning of the word "aggravation" and more particularly the word "or", plaintiff refers the Court to "Exhibit A" attached to the Statement of Undisputed Facts filed herein with emphasis on the case of Garratt v. City of Philadelphia, 127 A.2d 738, wherein the Court corrected the strained interpretation of the word "or", which had been construed by the administrative body to mean "and" so as to deprive a fireman of an award, much as the defendants in the instant case have interpreted the word so as to deprive the plaintiff of 26 2/3 per centum of his basic salary.

Norman H. Heller
Attorney for Plaintiff

[Certificate of Service]

[Filed August 1, 1962]

MOTION OF DEFENDANTS WALTER N. TOBRINER, JOHN B. DUNCAN AND BRIGADIER GENERAL F.J. CLARKE FOR SUMMARY JUDGMENT ON COUNT II OF THE COMPLAINT

The defendants, Walter N. Tobriner, John B. Duncan and Brigadier General F.J. Clarke move the Court to grant them summary judgment on Count II of the complaint on the ground that the complaint, together with the answer, the statements of material facts as to which

there is no genuine issue, plaintiff's Exhibit "A" and the memorandum of points and authorities in support of this motion show that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law on Count II of the complaint.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel,D.C

/s/ George H. Clark
Assistant Corporation Counsel,D.C.

Attorneys for Defendants

* * *

[Certificate of Service]

[Filed August 1, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT II OF THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

The plaintiff, a former member of the Metropolitan Police Department, D.C., was retired from active duty for a disability arising other than from the performance of duty. In Count I of his complaint he challenges the action of the Police and Firemen's Retirement and Relief Board (hereinafter referred to as the Retirement Board) in retiring him for disability arising other than from the performance of duty and the action of the Commissioners of the District of Columbia in affirming that order.

In Count I plaintiff prays for a mandatory injunction directing the defendants to reverse the order of the Retirement Board, to enter an order retiring plaintiff for disability arising from the performance of duty and to pay to him the difference in money between retirement at 40 per cent of his base salary and retirement at 66 2/3 per cent of his base salary from November 1, 1961.

The crux of the issue raised in Count II of the complaint is the interpretation to be placed on Section 4-527, D.C. Code, 1961 Edition. This matter is one to be determined solely as a question of law, and no factual determinations are necessary in order to decide the issue.

Count II requests a declaratory judgment, declaring that Section 4-527, D.C. Code, 1961 Edition, be interpreted to permit plaintiff's retirement for disability arising from the performance of duty with an annuity calculated at the rate of 66 2/3 per cent of his base salary.

Pertinent Statutory Authority

Statutory authority relative to the retirement of police and firemen in the District of Columbia is provided for in the Act of August 21, 1957, 71 Stat. 391, (hereinafter called Act) and appears as Sections 4-521 to 4-535, D.C. Code, 1961 Edition.

Prior to the enactment of this Act members of the Police and Fire Departments of the District of Columbia were not entitled to retirement benefits based on disability except where the disability was incurred in the performance of duty. At that time no retirement was possible for a policeman or fireman permanently injured outside the line of duty who had less than twenty-five years service. The defendants realized the inequities and hardships resulting from such deficiency in the retirement program and gave strong support to the passage by Congress of the 1957 Amendments, one of which, Section 4-526, D.C. Code, 1961 Edition, Sec. 12(f) of the Act taken from similar language in the Civil Service Retirement Act Amendments of 1956, specifically overcomes that deficiency.

It provides:

> "Retirement for Disability Not Incurred in Performance of Duty
>
> "(f) Whenever any member coming under this section completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such

member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement; Provided further, That the annuity of a member retiring under this subsection shall be at least 40 per centum of his basic salary at time of retirement."

Another of the Amendments, Section 4-527, D.C. Code, 1961 Edition, (Sec. 12(g) of the Act) provides:

"Retirement for Disability Incurred While Performing Duty

"(g) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement."

Pertinent Material Facts

The facts pertinent to the inquiry concerning the alleged arbitrary and capricious action of the defendants in sustaining the action of the Retirement Board are contained in the record of the hearing conducted by the Retirement Board on August 3 and August 10, 1961, and the order retiring plaintiff for disability arising other than from the performance of duty. Although plaintiff moves for summary judgment, the pleadings do not include the record. Therefore, no determination can be made concerning the alleged arbitrary and capricious action of the defendants, and plaintiff is not entitled to summary judgment on Count I of the complaint.

The facts pertinent to Count II of the complaint appear in plaintiff's statement of undisputed facts and are not controverted by the defendants. There the plaintiff sets out, in part, the statement of Henry F. Hubbard, Personnel Officer, D.C., made in a memorandum to the Commissioners of the District of Columbia, dated December 20, 1961. The statement is as follows:

> "The Board after considering all the testimony in this case was unable to find any evidence that would support a conclusion that Private Zangardi's condition arose from police duty. There was ample reason to find that police duty aggravated his condition."

Based upon the above finding of fact, the plaintiff says that if the defendants had interpreted Section 12(g) of the Act, it should be applied to the facts in this case, and he should be retired for disability proximately caused by the aggravation of an injury or disease, the origin of which is either unknown or in doubt, with an annuity calculated at the rate of 66 2/3 per cent of his basic salary.

Argument

The plaintiff in this action argues that the Retirement Board in applying the law to the facts it had before it wrongfully deprived plaintiff of substantial sums of money. that is, the difference between 40 per cent and 66 2/3 per cent of his base salary as a police officer.

After a hearing, the Retirement Board found that plaintiff was entitled to be retired for disability arising other than from the performance of duty with an annuity based upon 40 per cent of his basic salary. The Retirement Board also found that there was no evidence which would support a conclusion that plaintiff's condition arose from police duty and that there was ample reason to find that police duty aggravated plaintiff's condition.

The pertinent Act of Congress applied by the Retirement Board in this case appears in Section 4-526, D.C. Code, supra, (Sec. 12(f)) of the Act. Said Section of the Act provides for the retirement of a disabled police officer, when it appears that the disability proximately

resulted from an injury received or disease contracted other than in the performance of duty. Based upon its findings, the Retirement Board applied the proper Section of the Act. Contrary to the assertions of the plaintiff, the clear and unambiguous language of Section 5-427, D.C. Code, supra, (Sec. 12(g)) of the Act, prohibits its application when it appears that the injury or disease complained about had an unknown or doubtful beginning.

Plaintiff says, however, that Section 4-526, D.C. Code, supra, is applicable and that under his interpretation of said Section of the Act he should be retired at 66 2/3 per cent of his base salary for a disability proximately caused by a condition aggravated by but not arising from the performance of duty. The plaintiff argues that not only should Section 4-527 be applied in his case but that the interpretation placed on said Section by the defendants is wrong, and his interpretation should be used.

Opinion of the Corporation Counsel dated July 29, 1959 (CCO:310.1 - Disability, section (g))

Section 12(g), the Act of August 21, 1957, supra, was interpreted as follows:

"(a) Whenever the Commissioners or their designated agents make a finding based on substantial evidence that a member has been injured or has contracted a disease in the performance of duty which permanently disables him for the performance of duty, he may be retired pursuant to authority contained in subsection(g).

"(b) Whenever the Commissioners or their designated agents make a finding based on substantial evidence that the member was injured or contracted a disease in the performance of duty; that such injury or disease was not sufficient to permanently disable him for the performance of duty; that after being restored to health he was returned to duty and thereafter, in the further performance of duty, the injury or disease originally contracted in the performance of duty was aggravated by such further performance of duty so as, at the time, to permanently disable him for further

performance of duty, then the Commissioners or their designated agents may, on the basis of the above findings, retire such member pursuant to authority contained in subjection (g).

"In my opinion these are the only two types of cases which warrant retirement pursuant to the provisions of subsection (g) of section 12 of the Act approved September 1, 1916, as amended by the Policemen and Firemen's Retirement and Disability Act Amendments of 1957."

The foregoing interpretation of the Act by the Corporation Counsel requires no strained construction of the statute, nor the substitution of words used by Congress with others not found in the Act. The defendants say that this interpretation of the Act is the only logical and proper one that can be placed on said Act in order to carry out the intent of Congress.

Plaintiff challenges this interpretation on the ground that it ignores a basic ambiguity in the Act itself. Plaintiff then proceeds to substitute his words for those of Congress in order to reach a result which enables him to retire at the rate of 66 2/3 per cent of his base salary.

The plaintiff says that the word "or", which separates the first and second phrases of Section 12(g) of the Act, should be deleted and the word "and" substituted in its place, although this change in no way assists him in reaching the result he seeks. If we adopt the reasoning of the plaintiff and join the two phrases in the conjunctive, the result is that a member seeking retirement must still demonstrate that the injury or disease which he claims to be aggravated was proximately caused by the performance of police duty. It is clear that construction of the statute which does violence to the clear language of the Act does not assist the plaintiff in his effort to be retired at 66 2/3 per cent rather than 40 per cent of his base salary.

Under the circumstances of this case, where the Retirement Board found that plaintiff's condition did not arise from the performance of duty, plaintiff cannot be retired for disability incurred in the performance of duty under any construction of Section 4-527, D.C. Code, 1961 Edition.

In this case the plaintiff is actually asking the Court to amend Section 12(g) of the Act and to permit him to retire for disability resulting from a condition not arising from the performance of police duty but aggravated by the performance of police duty. To do this would actually create a third category for disability retirement different from the two set out in Section 12(g). Plaintiff argues that where the proximate cause of an injury or disease is unknown or doubtful but shown to be aggravated by performance of police duty, retirement at 66 2/3 per cent of his basic salary is permitted.

The defendants are now sponsoring an amendment to Section 12(g) of the Act, which if approved by Congress, will cover the situation in which the plaintiff finds himself.

In H.R. Rep. No. 892, 87th Cong., 1st Sess. (1962), the Committee on the District of Columbia considered H.R. 6836, a bill to amend the Police and Firemen's Retirement and Disability Act and reported favorably thereon and recommended that the bill pass. In the report the Committee stated:

> "The purpose of this legislation is to create an additional category of service-connected disability which will enable the member to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty, and to place the burden of proof on the Government that such duty did not aggravate the injury or disease contracted (it may or may not have been incurred on (sic) contracted in the performance of duty).
>
> "Such legislation is comparable to and in keeping with industrial compensation procedures.
>
> "A member retiring under this proposed legislation will receive the same annuity as if there was no doubt of the disability having resulted exclusively in the performance of duty."

The report of the Committee on the District of Columbia demonstrates that Congress and the defendants are very much aware that Section 12(g) of the Act does not permit disability retirement under 66 2/3 per cent under the facts in this case. The proposed amendment will create authority to retire members of the Police Department who are disabled under circumstances where it cannot be shown that the disablement was proximately caused by an injury arising from the performance of duty or a disease contracted other than in the performance of duty but in any event a condition aggravated by the performance of duty. This new category would fit the facts in plaintiff's case and allow his retirement for disability at 66 2/3 per cent of his base salary. The fact that legislation is now pending in Congress to amend Section 12(g) of the Act to expressly provide for retirement under the circumstances described in this third category shows beyond a doubt that the construction of Section 12(g) urged by plaintiff is without merit. If such a construction carried out the intent of Congress as expressed in Section 12(g), there would now be no need to amend said Section to accomplish the very same thing.

Conclusion

Based upon the foregoing, defendants respectfully request the Court to deny plaintiff's motion for summary judgment and to grant them summary judgment as to Count II of the complaint.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel,D.C.

/s/ George H. Clark
Assistant Corporation Counsel,D.C.

Attorneys for Defendants

[Certificate of Service]

[Filed August 2, 1962]

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THEY CONTEND THERE IS NO GENUINE ISSUE

The defendants contend there is no genuine issue of fact necessary to be litigated with respect to Count II of the Complaint. The essential facts necessary for a determination of the question of law presented in Count II of the complaint are undisputed and are as follows:

1. On and before October 31, 1961, plaintiff was a member of the Metropolitan Police Department, D.C.

2. Prior to October 31, 1961, plaintiff had completed more than five years of police service.

3. The Police and Firemen's Retirement and Relief Board unanimously voted to retire plaintiff for disability arising other than from the performance of duty under Section 4-526, D.C. Code, 1961 Edition.

4. The Police and Firemen's Retirement and Relief Board found that there was no evidence which would support a conclusion that plaintiff's condition arose from police duty.

5. The Police and Firemen's Retirement and Relief Board found that police duty aggravated plaintiff's condition.

6. On January 29, 1962, defendants affirmed the order of the Police and Firemen's Retirement and Relief Board.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel, D.C.

/s/ George H. Clark
Assistant Corporation Counsel, D.C.

Attorneys for Defendants

[Certificate of Service]

[Filed August 2, 1962]

DEFENDANTS' STATEMENT OF GENUINE ISSUES

The defendants in compliance with Rule 9(h) submit herewith the material facts as to which they contend there is a genuine issue necessary to be litigated as to Count I of the complaint:

The material facts necessary to be considered in connection with the legal issue raised in Count I of the complaint are to be found in the record of the hearings held by the Police and Firemen's Retirement and Relief Board, and the hearing held by the Commissioners of the District of Columbia on plaintiff's appeal from the decision of the Retirement Board. The facts elicited at those hearings are not a matter of record in this civil action, and the absence thereof precludes any determination as a matter of law in regard to plaintiff's allegation that the action of the defendants was arbitrary and capricious. Until such facts are pleaded, there exists genuine issues necessary to be litigated.

/s/ Chester H. Gray
Corporation Counsel, D.C

/s/ John A. Earnest
Assistant Corporation Counsel,D.C.

/s/ George H. Clark
Assistant Corporation Counsel,D.C.
Attorneys for defendants

[Certificate of Service]

~~[Filed October 23, 1962]~~

~~ORDER~~

~~Upon consideration of plaintiff's motion for summary judgment, the exhibits attached thereto, the memorandum of points and authorities in support thereof, the motion of defendants Walter N. Tobriner, John B. Duncan and Brigadier General J.F. Clarke for summary judgment on Count II of the complaint and the memorandum of points and authorities in support thereof, and upon oral argument in open court, it is by the Court this 23rd day of October, 1962,~~

[Filed April 2, 1963]

ORDER TO VACATE PREVIOUS ORDER AND FOR ENTRY OF FINAL JUDGMENT ON COUNT TWO

This cause having come on plaintiff's motion to vacate the Order of Court entered herein on the 23rd day of October, 1962, and for entry of a final judgment on Count Two of the Complaint with an express determination that there is no just reason for delay, and after consideration of plaintiff's motion and the opposition of defendants thereto, it is, by the Court, this 2nd day of April,1963,

ORDERED, That the Order entered herein on the 23rd day of October, 1962, denying plaintiff's motion for summary judgment; granting defendants' motion for summary judgment on Count Two of the complaint is hereby vacated, and it is further,

ORDERED, That final judgment be entered as follows:

Upon consideration of plaintiff's motion for summary judgment, the exhibits attached thereto, the memorandum of points and authorities in support thereof, the motion of defendants Walter N. Tobriner, John B. Duncan and Brigadier General J. F. Clarke for summary judgment on Count Two of the complaint and the memorandum of points and authorities in support thereof, and upon oral argument in open Court it is by the Court,

ORDERED: That plaintiff's motion for summary judgment be, and the same is, hereby denied, and it is

FURTHER ORDERED: That defendants' motion for summary judgment on Count Two of the complaint be, and it is, hereby granted, and it is

FURTHER ORDERED: Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that Count Two of the complaint be, and it is, hereby dismissed and the undersigned expressly determines that there is no just reason for delay and expressly directs the entry of final

judgment dismissing Count Two of the complaint.

/s/ McLaughlin, Charles F.
Judge

[Certificate of Mailing]

[Filed April 29, 1963]

NOTICE OF APPEAL

Notice is hereby given this 29th day of April, 1963, that Frederick C. Zangardi hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 2nd day of April, 1963 in favor of defendants Walter N. Tobriner, John B. Duncan and Brigadier General J. F. Clarke, Board of Commissioners of the District of Columbia against said Frederick C. Zangardi.

/s/ Norman H. Heller
Attorney for Plaintiff.

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 17,900

FREDERICK C. ZANGARDI,

Appellant,

v.

WALTER N. TOBRINER, President,
JOHN B. DUNCAN, Member,
BRIG. GEN. CHARLES M. DUKE, Member,
Board of Commissioners of the District of Columbia,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHESTER H. GRAY,
Corporation Counsel, D. C.
MILTON D. KORMAN,
Principal Assistant
Corporation Counsel, D. C.
HUBERT B. PAIR,
Assistant Corporation
Counsel, D. C.
RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellees,
District Building,
Washington 4, D. C.

QUESTION PRESENTED

In the opinion of appellees, the question is:

Is not a member of the Metropolitan Police Department, retired October 31, 1961, for disability resulting from the aggravation, by the performance of duty, of a non-service connected injury or disease, ineligible, under D. C. Code, 1961, § 4-527, for retirement for disability incurred in the performance of duty?

I N D E X

SUBJECT INDEX

DISTRICT OF COLUMBIA CODE, 1961, CITED

OTHER AUTHORITIES CITED

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 17,900

FREDERICK C. ZANGARDI,

Appellant,

v.

WALTER N. TOBRINER, President,
JOHN B. DUNCAN, Member,
BRIG. GEN. CHARLES M. DUKE, Member,
Board of Commissioners of the District of Columbia,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

In June 1961, appellant, a long-time member of the Metropolitan Police Department, was found by the Board of Police and Fire Surgeons to be suffering from psychophysiological reaction, multiple, and recommended for disability retirement (J. A. 1-2, 6).

In October, 1961, the Police and Firemen's Retirement and Relief Board, upon consideration of the evidence adduced at the hearings before it, " * * * was unable to find any evidence that would support a conclusion that Private Zangardi's condition arose from police duty." There was, however, " * * * ample reason to find that police duty aggravated his condition" (J. A. 1-2, 6, 10).

The Board, accordingly, ordered appellant retired, effective October 31, 1961, for disability incurred other than in the performance of duty, pursuant to D. C. Code, 1961, § 4-526, under which he would receive an annuity of 40 per cent of his basic salary (J. A. 1-2, 6).

Appellant then appealed to appellees, Commissioners of the District of Columbia, contending that, since the condition which caused his disability, even though it did not arise from the performance of duty, had, admittedly, been aggravated by police duty, he was entitled to be retired for disability incurred in the performance of duty, pursuant to D. C. Code, 1961, § 4-527, under which he would receive an annuity of 66 2/3 per cent of his basic salary (J. A. 2, 6).

Having been advised by the Corporation Counsel that, under the law then in effect, [1] a police officer disabled as a result of the aggravation, by the performance of duty, of a non-service connected injury or disease was not eligible to be retired for disability incurred in the performance of duty, appellees, on January 29, 1962, rejected appellant's contention and sustained the order of the Retirement Board (J. A. 2-4, 6-7).

Alleging that appellees' action in retiring him under § 4-526, rather than under § 4-527, was "arbitrary, capricious, unsupported by facts [and] based upon an improper interpretation of the law," appellant, on March 24, 1962, brought suit against appellees in the court below seeking, in count one, a mandatory injunction directing appellees to reverse their decision retiring him under § 4-526, to retire him under § 4-527, and to pay him the difference between the respective annuities, and, in count two, a declaratory judgment that § 4-527 "* * * includes aggravation of an injury or disease which did not originally arise in the performance of duty" and that appellant was entitled to be retired under § 4-527, rather than under § 4-526 (J. A. 1-5).

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[1] Effective October 23, 1962, the law was changed. See D. C. Code, Supp. II, 1963, § 4-527 (2).

In their answer to the complaint, appellees admitted that the condition which caused appellant's disability, although not resulting from the performance of police duty, had been aggravated by police duty, and that they had consistently interpreted § 4-527 to be inapplicable to such cases. Appellees, however, denied that their action in retiring appellant under § 4-526 was arbitrary, capricious, unsupported by facts or based upon an improper interpretation of the law (J. A. 6-7).

Thereafter, first appellant and then appellees moved for summary judgment on count two only of the complaint which contained appellant's claim for declaratory relief (J. A. 8, 16).

On April 2, 1963, the District Court denied appellant's motion, granted appellees' motion and, pursuant to Rule 54 (b), F. R. C. P., entered a final judgment dismissing count two only of the complaint (J. A. 27-28). This appeal followed (J. A. 29).

SUMMARY OF THE ARGUMENT

Subsequent to appellant's retirement, at the instigation of the Commissioners of the District of Columbia, the Congress amended D. C. Code, 1961, § 4-527, so as to provide that, on and after October 23, 1962, a police officer disabled as a result of the

aggravation by the performance of duty of a non-service connected injury or disease would be entitled to retirement for disability incurred in the performance of duty. As its history clearly reflects, the Congress, in enacting this amendatory legislation, recognized and acknowledged that the law in effect at the time of appellant's retirement did not so provide. It follows that the construction of the statute which appellant urges cannot be sustained.

ARGUMENT

The court below correctly denied declaratory relief to appellant.

Appellant's sole assignment of error is that the court below abused its discretion in not granting him, on the bases of the pleadings, [2] a declaratory judgment that he was entitled, under D. C. Code, 1961, § 4-527, to be retired for disability incurred in the performance of duty.

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[2] At the time the court below acted on the cross-motions for summary judgment, there was before it no part of the administrative record relating to appellant's retirement, other than a memorandum in the nature of points and authorities or an informal brief (J. A. 12-15) submitted by appellant's counsel to appellees at the time of the hearing on the appeal to them.

Notwithstanding the clear language of the statute to the contrary, appellant argues that the Congress, in enacting § 4-527, intended that a police officer disabled as a result of the aggravation by the performance of duty of a non-service connected injury or disease would be entitled to retirement for disability incurred in the performance of duty and that appellees' opposite construction of the statute is, therefore, plainly erroneous.

That appellant's contention in this respect is utterly baseless is clearly demonstrated by the action of the Congress in amending the statute. See D. C. Code, Supp. II, 1963, § 4-527 (2). On October 23, 1962, the Congress added a new subsection to § 4-527, reading:

> "(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of

> retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement. * * *"

Obviously then, the statute, as it existed at the time appellant was retired (i. e. prior to October 23, 1962), cannot be construed as appellant contends it should be, for such an interpretation would require a holding that the carefully-considered action of the Congress in amending the statute was completely unnecessary and served no useful purpose. It is, of course, axiomatic that no Act of Congress should be so construed unless such a result is manifestly compelled. And clearly that is not the case here.

It may, of course, be argued, although appellant does not do so (indeed, he completely ignores the amendment), that the Congress amended the statute for the sole purpose of correcting an administrative misinterpretation of its intention. The legislative history, however, absolutely refutes any such suggestion. Nowhere is there the slightest indication that the amendment was enacted for this purpose. On the contrary, both the House and Senate Reports [3] indicate that the purpose of the legislation was:

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[3] H. R. Report No. 892, 87th Cong., 1st Sess., and Senate Report No. 2271, 87th Cong., 2d Sess., which accompanied H. R. 6836, 87th Cong., 1st Sess.

> "* * * to amend existing law so as to create an additional category of service-connected disability which will enable policemen and firemen to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty." [Empahsis supplied.]

Moreover, as clearly appears from H. R. Report No. 892, supra, it was the Commissioners of the District of Columbia, and not the Congress, who instigated the amendatory legislation. Any suggestion then that such legislation was passed solely to correct an administrative misinterpretation of the intent of the Congress, rather than "to create an additional category of service-connected disability" cannot be sustained.

It must thus be manifest that, in enacting the amendment of October 23, 1962, the Congress clearly recognized and acknowledged that under the law in effect prior thereto (and at the time of appellant's retirement), a police officer disabled as a result of the aggravation by the performance of duty of a non-service connected injury or disease was not eligible for retirement for disability incurred in the performance of duty. Indeed, upon the record, no other reasonable conclusion is possible. It follows of necessity that appellant's sole assignment of error lacks even a semblance of substance.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the District Court's denial of appellant's claim for declaratory relief was clearly not an abuse of discretion, and that its judgment, being in all respects correct and in accordance with law, should, accordingly, be affirmed.

CHESTER H. GRAY,
Corporation Counsel, D. C.

MILTON D. KORMAN,
Principal Assistant Corporation
Counsel, D. C.

HUBERT B. PAIR,
Assistant Corporation
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RICHARD W. BARTON,
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District Building,
Washington 4, D. C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Frederick C. Zangardi,

Appellant

v. No. 17,900

Walter N. Tobriner, President, et al.,
Board of D.C. Commissioners,

Appellees

MEMORANDUM AS TO POWER OF COURTS OF APPEALS TO SET ASIDE FINDING BY DISTRICT COURTS THAT THERE IS NO JUST REASON FOR DELAY AND DIRECTING ENTRY OF FINAL JUDGMENT UNDER RULE 54(b)

"The discretionary power to certify or to decline a certificate, in connection with an adjudication fully disposing of one or more but less than all of the multiple claims, is lodged in the District Court because of its first hand knowledge of the litigation", 6 Moore's Federal Practice 263, Section 54.41(3).

At page 266 Moore's states:

> "When the District Court exercises its discretion and executes a certificate, pursuant to the Rule, i.e., to accompany an adjudication fully disposing of one or more but less than all of the claims, an Appellate Court will respect this action by holding the judgment final for purposes of appeal. And, as we have noted, there is a tendency in cases of doubt, due to multiple parties or because it is otherwise unclear whether there is only one claim or multiple claims, to allow the certificate to balance the doubt in favor of finality".

To answer the Court's inquiry without hedging, appellant

submits that the finding of the Trial Judge under Rule 54(b) is subject to appellate review and certain criteria has been set out by the Supreme Court. In Sears, Roebuck and Co. v. Mackey (1956), 351 U.S. 427, 76 S.Ct. 895, 100 L.ed. 780, the Court stated:

1. The amended rule does not apply to a single claim action nor to a multiple claims action in which all the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise ready for appeal.

2. When the rule is applicable, the District Court acts as a "dispatcher" in determining when each final decision is ready for appeal.

3. When the rule is applicable, the failure to issue a certificate makes that decision for the moment non-appealable. It becomes appealable only if a certificate is subsequently issued or the entire case is disposed of.

4. When the rule is applicable and there is a certification, the Court of Appeals has jurisdiction under 28 U.S.C. 1291, unless;

(a) the District Court has treated as final that which is not final, or;

(b) the issuance of the certificate constituted an abuse of discretion because the claims were inherently inseparable or too closely related to justify separate appeals.

5. As so construed, Rule 54(b) does not conflict with the

"final decision" principle of 28 U.S.C. 1291.

In Cold Metal Process Co. v. United Engineering and Foundry Co., (1956, 351 U.S. 445, 79 S.Ct. 904, 100 L.ed 789, the Supreme Court stated: "If the District Court certifies a final order on a claim which arises out of the same transaction and occurrence as pending claims and the Court of Appeals is satisfied that there has been no abuse of discretion, the order is appealable". The Court went on to hold that the rule makes appealable certain final decisions which would not have been appealable prior to the promulgation of the Federal Rules of Civil Procedure but that this does not impair the statutory concept of finality embraced in 28 U.S.C. 1291.

The purpose of the concept of finality is to avoid piecemeal appeals. In the instant case the question put before the Court is for a declaration of the meaning of a District of Columbia Code provision. The case was before this Court in No. 17,476, and was dismissed because of the lack of certification by the Trial Judge. After dismissal, and pursuant to the holding in the case of Southern Parkway Corp. v. Lakewood Park Corp., 106 U.S.App.D.C. 372, 273 F.2d 107, and Chvala v. D.C. Transit System, Inc., 110 U.S.App.D.C. 331, 293 F.2d 519, appellant moved the District Court to vacate the judgment on Count Two which had been entered without an express determination and direction as required by Rule 54(b), and to render the same judgment with an express determination and direction for entry of judgment under Rule

54(b). The Trial Judge, being familiar with the issues in both Counts of the Complaint, saw fit to vacate the judgment and to certify that there was no just reason for delay.

Appellant brings to the attention of the Court the case of United States v. Cafaratti, 91 U.S.App.D.C. 297, 202 F.2d 13, where the Court held that if the appeal was not allowed at that time the Government would be certain to lose since the evidence had been suppressed and would have to go to trial without evidence. In the instant case, since the Trial Judge has decided Count Two, the prayer for declaratory judgment, and has adjudged that appellees are correctly interpreting Title 4, Section 527 of the Code, this becomes the law of the case and the Trial Court deciding Count One will be bound by the decision and appellant certain to lose, since the allegation in Count One that appellees' action was "based upon an improper interpretation of the law" (J.A. 3) has already been decided against appellant.

Appellant's prayer in Count Two is for declaratory judgment, asking for the correct interpretation of a statute. A decision in this appeal will dispose of the entire case and will not make for piece-meal appeals. If the Court affirms the decision of the Trial Court, then appellees are correctly interpreting the law and they have not acted arbitrarily or capriciously. In order for appellant to prevail on Count One, he would then have to prove that not only was his disability aggravated by police duty, but in addition that it was originally caused by police duty. The issues before the Court in Count Two are not the same as those presented by Count One, except on the question of the

interpretation of the Code provision in question. If the Court reverses the decision of the Trial Court, then appellees are not correctly interpreting the Code provision in question and therefore, the case as presented in Count One, appellees admitting that appellant's retirement was due to disability aggravated by police duty, appellant, on proper motion will be entitled to summary judgment. In that event, the issue of interpretation of the Code provision will be res judicata, the question having been decided by the Court in this appeal, and it is not probable that appellees would bring the question back to this Court on appeal.

It would appear that a decision by the Court of Appeals at this time will dispose of the case in its entirety, and there will be no reason to bring the case back to the Court of Appeals. The only possible remaining issue in Count One will be an issue of fact and if there is substantial evidence for a decision by the Trial Court as the trier of the facts there will be no issue for a further appeal.

Finally, appellant says that the issues in Count One and Count Two of this case, although arising out of the same transaction, are not inherently inseparable or too closely related to justify separate appeals and appellant prays the Court not to set aside the finding of the District Court, and if it is unclear, to allow the certificate to balance the doubt in favor of finality.

Respectfully submitted,

Norman H. Heller

Norman H. Heller
Attorney for Appellant
711-14th Street, N.W.
NAtional 8-3551

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Memorandum to Richard W. Barton, Esq., Assistant Corporation Counsel, D.C., attorney for appellees, postage prepaid, this 30th day of December, 1963, District Building, Washington 4, D.C.

Norman H. Heller

Norman H. Heller
Attorney for Appellant